CIVIL PROCEDURE NEWS

Issue 6/2023 16 June 2023

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In Brief

Cases

- **Harrington & Charles Trading Co Ltd v Mehta** [2023] EWHC 998 (Ch) (21 April 2023, unrep. (Miles J sitting with Master Kaye)

Consolidation of proceedings

CPR r.3.1(2)(g). An application was made to consolidate three sets of proceedings. The claims were brought by the same claimant against a number of defendants arising out of an alleged fraud. **Held**, the proceedings were consolidated. The application was granted on the basis that: (i) due to the nature of the three sets of proceedings they were in substance and reality the same claim: the proceedings covered the same set of allegations (at [62]–[63]); (ii) consolidating the proceedings at an early stage would save costs and time. This would promote efficient case management. It would also render it more efficient a means to deal with any amendments to the proceedings. One set of proceedings, with one claim number, would also be more easily managed via the e-filing system (at [66]–[67]); (iii) not consolidating the proceedings could not conceivably lead to more efficient separate management or trials (at [68]); (iv) consolidation would not lead to less efficient management (at [69]–[70]); (v) consolidation would not lead to increased costs (at [72]). In the premises, consolidation would further the overriding objective. The judge also rejected a submission that consolidation should not be considered before some of the defendants had been served with proceedings and that it was a fundamental principle of justice that parties should have notice before orders are made against them, which affect their interests. As the judge put it:

> *"[84] First, the cases relied on by the defendants [to make the point concerning notice being required] all concerned injunctions or similar orders. They required the respondent to act or refrain from acting. They potentially engaged the coercive powers of the court, including its contempt jurisdiction. Here the relevant defendants are not being required to do, or refrain from doing, anything. It is true that an order for consolidation may affect their interests, but they will have the right to apply to set aside the order and will not be required to do, or refrain from doing anything in the meantime. I accept that the right to set aside an order made without notice is not a panacea in the sense of a complete cure. But the ability to apply to set aside an order is nonetheless a relevant factor when considering whether to make a case management order without notice. (I also note in relation to the right of the defendants to apply to set aside any order for consolidation that as I discussed with counsel during the hearing it should be made clear that they should be able to do so without thereby submitting to the jurisdiction of these courts and appropriate wording should be included in any order.)*
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> *[85] Second, the question whether to consolidate is, as counsel for the defendants put it, a pure question of case management to be exercised so as to further the overriding objective by creating efficiencies and cost savings. It is a power which the court may indeed decide to exercise of its own initiative if this favours the overriding objective. Where it does so, it gives the affected party a right to set aside its order. It is common for the court to exercise its powers of case management without notice to one or other of the parties in furtherance of the overriding objective. It is to be borne in mind that the court itself also has an interest in effective and efficient case management."*

Furthermore, the application to consolidate was akin to an application to join new parties to existing proceedings under CPR r.19.4. Such orders can be made without notice. As such there can be no reason why consolidation cannot occur without notice (at [89]). The application was also held not to have been brought as an abuse of process or improperly. A second issue was considered, that of whether an extension of time could be granted to extend the duration of the consolidated claim form, so that an application could then be made to serve it out of the jurisdiction. The judge noted that the principles applicable to such applications had recently been summarised by the Court of Appeal in ***ST v BAI (SA) (Trading as Brittany Ferries)*** (2022) at [62] as:

> *"[62] For ease of reference, I summarise the relevant general principles as follows:*
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> *i) The defendant has a right to be sued (if at all) by means of originating process issued within the statutory period of limitation and served within the period of its initial validity of service. It follows that a departure from this starting point needs to be justified;*
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> *ii) The reason for the inability to serve within time is a highly material factor. The better the reason, the more likely it is that an extension will be granted. Incompetence or oversight by the claimant or waiting some other development (such as funding) may not amount to a good reason. Further, what may be a sufficient reason*

for an extension of time for service of particulars of claim is not necessarily a sufficient reason for an extension for service of the claim form;

iii) *Where there is no good reason for the need for an extension, the court still retains a discretion to grant an extension of time but is not likely to do so;*

iv) *Whether the limitation period has or may have expired since the commencement of proceedings is an important consideration. If a limitation defence will or may be prejudiced by the granting of an extension of time, the claimant should have to show at the very least that they have taken reasonable steps (but not all reasonable steps) to serve within time;*

v) *The discretionary power to extend time prospectively must be exercised in accordance with the overriding objective."*

Those principles were applied, and the extension was granted. ***ST v BAI (SA) (t/a Brittany Ferries)*** [2022] EWCA Civ 1037, unrep., CA, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.3.1.9.)

■ **Peterson v Howard De Walden Estates Ltd** [2023] EWHC 929 (KB), 28 April 2023, unrep. (Eyre J)

Payment of incorrect issue fee – a nullity not an error of procedure

CPR r.3.10. The claimants attempted to issue an application under s.48(3) of the Leasehold Reform, Housing & Urban Development Act 1993. The court refused to issue the application. It did so, administratively, on the basis that the claimant's solicitors had not authorised payment of the full issue fee. They had authorised payment of £308 rather than the amount due, which was £332. Consequently, the application could not be issued as the claimant's solicitors did not receive notification of non-issue until after the expiry of the statutory limitation period. An application was made under CPR r.3.10 to rectify the error concerning the issue fee as an error of procedure. The application was refused. The claimants appealed to the High Court. The appeal was dismissed. As an important point of procedure and practice, it may be the case that permission for a second appeal to the Court of Appeal will be sought. In dismissing the appeal, Eyre J held that the error did not relate to an error of procedure arising from a failure to comply with a rule or practice direction. It arose as a failure to comply with the requirements provided for by a separate statutory instrument concerning court fees: the Court Fees Order 2008. Support for this conclusion was apparent in ***Mucelli v Albania*** (2009) at [74], where Lord Neuberger concluded, in a different context, that the CPR provided no power to extend statutory service time limits notwithstanding its power to extend procedural service time limits. While the failure to comply was, in the normal sense of the words, an error of procedure, it was an error of procedure to which the CPR and CPR r.3.10, particularly, did not apply. That the Civil Procedure Rule Committee had made rules governing pre-action conduct did not support the submission that CPR r.3.10 might do so (at [40]–[41]). As Eyre J concluded:

"[58] I am satisfied that properly interpreted an error of procedure for the purposes of rule 3.10 is limited to an error in a procedure laid down by the CPR or potentially by an equivalent procedural provision and that it is not concerned with matters occurring before the commencement of proceedings (although it can be used to remedy defects of form in proceedings once commenced). In relation to the circumstances of this case an error of procedure does not include a failure to pay a court fee needed to initiate proceedings where the requirement to pay that fee derives not from the CPR nor from any other rule or direction made by the Civil Procedure Rule Committee but from an order made by the Lord Chancellor exercising powers deriving from the Courts Act 2003."

While the conclusion may appear to be right in terms of its interpretation of CPR r.3.10, its result appears to be unjust in its effect. That being said it is consistent with the approach taken by the Court of Appeal in ***Page v Hewetts*** [2012] EWCA Civ 805 at [38], which provided that a claim would be brought in time if it was delivered to a court office within a limitation period if it was accompanied by a request to issue and the "appropriate fee". In this case the appropriate fee was not provided. Consideration of this issue might have benefited from submissions on ***Atha & Co Solicitors v Liddle*** [2018] EWHC 1751 (QB), where Turner J considered the consequences of a claim being issued on payment of the wrong court fee, not least as that claim was held to have been brought in time for limitation purposes. It would seem rather arbitrary and unjust for a claim's validity, particularly where limitation is in issue, to be determined by reference to whether, on proffering the wrong court fee, the fact of incorrect payment is noted by HMCTS and it makes an administrative decision to issue the claim or not. ***Bamber v Eaton*** [2004] EWHC 2437 (Ch); [2005] 1 W.L.R. 760, ChD, ***Mucelli v Albania*** [2009] UKHL 2; [2009] 1 W.L.R. 276, HL, ***Page v Hewetts*** [2012] EWCA Civ 805, unrep., CA, ***Kimathi v Foreign and Commonwealth Office*** [2016] EWHC 3005 (QB); [2017] 1 W.L.R. 1081, QBD, ***Manolete Partners PLC v Hayward & Barrett Holdings Ltd*** [2021] EWHC 1481 (Ch); [2022] B.C.C. 159, ChD, ***Jennison v Jennison*** [2022] EWCA Civ 1682; [2023] 2 W.L.R. 1017, CA, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.3.10.2.)

■ **CNM Estates (Tolworth Tower) Ltd v Carvill-Biggs** [2023] EWCA Civ 480, 5 May 2023, unrep. (Vos MR, Newey and Males LJJ)

Permission to amend particulars of claim – late amendments

CPR r.17.3. An application was made to amend a particulars of claim to add a claim for gross negligence. The amendment was refused. On appeal to the Court of Appeal, it allowed, by a majority, the appeal. In doing so the Court of Appeal provided further guidance on the approach to late amendments. The Court drew a distinction between late amendments and very late amendments. The latter were such as to require a fixed trial date to be lost. Where very late amendments were concerned, it was well-established that an application had to satisfy a high threshold test:

> *"[67] As can be seen from Quah Su-Ling at [38], the courts have distinguished between 'late' and 'very late' amendments, a 'very late' amendment being one which would cause the trial date to be lost. As Lloyd LJ observed in Swain-Mason v. Mills & Reeve LLP [2011] EWCA Civ 14, [2011] 1 WLR 2735, at [72], 'the court is and should be less ready to allow a very late amendment than it used to be in former times, and ... a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court'. Quah Su-Ling itself involved an application to make 'very late' amendments and, in that context, Carr J thought it appropriate to assess the strength of the new case: see [57]."*

Where an application to amend was late, but not very late, the court should consider whether the proposed amended claim has a real prospect of success. If it does, it would not normally be appropriate to consider the strengths of the new case in considering whether to permit the amendment. In this late amendments differed from the approach taken to very late amendments:

> *"[74] Asplin LJ's comments in Elite thus lend no support to any idea that, so far as the strength of a claim is concerned, the courts take a different approach in the context of a 'late' amendment to that adopted in relation to summary judgment. To the contrary, Asplin LJ relied on cases in which the principles governing summary judgment applications were addressed, and her remarks reflect those principles. Nor were we taken to any other authority in which it had been held that, when considering a 'late' (as opposed to a 'very late') amendment, it was permissible to attach weight to the apparent weakness of a case which would survive an application for reverse summary judgment.*
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> *[75] As we have indicated, an application for permission to amend particulars of claim will be refused if the amendments put forward a new case which would have 'no real prospect of succeeding' within the meaning of CPR Part 24. Beyond that, the Court has to strike a balance between the interests of the applicant and those of other parties and litigants more generally: '[i]n essence, the court must, taking account of the overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted' (Nesbit Law Group LLP v. Acasta European Insurance Company Ltd [2018] EWCA Civ 268, at [41] per Vos LJ).*
>
> *[76] Aside from very late amendments, we do not think the perceived strength of the case is normally a factor to be taken into account when undertaking that balancing exercise. As Carr J recognised, however, in Quah Su-Ling at [38(d)]: 'lateness is not an absolute, but a relative concept'. There will therefore perhaps be cases where the quality of the delay is unclear. In such cases, it may be necessary to consider, as Carr J suggested: 'a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done'. But even if it is necessary to adopt that approach when the amendment is on the cusp of being 'late' and 'very late', it will never be appropriate to attempt to conduct a mini-trial.*
>
> *[77] The general rule is that, except in the case of 'very late' amendments, unless it can be seen that a claim has no real prospect of succeeding, its merits should be determined at a full trial. The warnings against mini-trials apply with just as much force to applications to amend as they do to summary judgment or jurisdiction disputes. The CPR do not bar litigants from pursuing claims that might at an interlocutory stage be considered weak. In our view, HH Judge Eyre QC (as he then was) correctly summarised the principles applicable to the determination of an application to amend in Scott v. Singh [2020] EWHC 1714 (Comm) at [19]:*
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> > *'The new case set out in the proposed pleading must have a real prospect of success .... The approach to be taken is to consider those prospects in the same way as for summary judgment namely whether there is a real as opposed to a fanciful prospect of the claim or defence being raised succeeding. It would clearly be pointless to allow an amendment if the claim or defence being raised would be defeated by a summary judgment application. However, at the stage of considering a proposed amendment that test imposes a comparatively low burden and the question is whether it is clear that the new claim or defence has no prospect of success. The court is not to engage in a mini-trial when considering a summary judgment application and even less is it to do so when considering whether or not to permit an amendment.'"*

The Court of Appeal also considered the approach to be taken to unless orders. It did so as relief from sanction was required in order to make the application for permission to amend. The Court of Appeal unanimously emphasised that it was important to determine whether there had been non-compliance with an order, which imposed a sanction. Whether there had been compliance or non-compliance was a binary question:

> *"[42] Whether relief from sanction should be granted must be determined in accordance with the approach set out in the well-known case of Denton v T.H. White Ltd [2014] EWCA Civ 906, [2014] 1 WLR 3296, but before that approach comes into play, two prior questions must be considered. The first is whether a rule, practice direction or court order imposes a sanction. The second is whether a party has failed to comply with the rule, practice direction or court order in question.*
>
> *[43] In the present case the unless order undoubtedly imposed a sanction, namely that in the event of non-compliance CNM's claim would be struck out. That means that its whole claim would be struck out. There was no scope for the halfway house adopted by the judge, which was to hold that the effect of the order was to prevent CNM from pursuing a claim which was not included in the draft amendment served within the time specified, while permitting the claim which it had pleaded in time to go forward. That is not what the unless order said. The correct position was that either CNM had complied with the order, in which case no question of relief from sanction arose, or it had not, in which case (subject to relief from sanction) its whole claim was struck out.*
>
> *[44] So did CNM comply with the order? This is a binary question. Either it did or not. What the order required CNM to do was to serve a draft amendment to its Particulars of Claim within the specified deadline. That is what it did. It cannot be, and was not, suggested that the document which CNM served was not a 'draft Re-Re-Amended Particulars of Claim'. Accordingly it complied with the order. That should have been the end of any question of relief from sanction being needed.*
>
> *[45] I would accept that it is possible to envisage a case where a party who is required to comply with an unless order, for example by serving a pleading, does something within the deadline which cannot properly be regarded as compliance, for example by serving a document which contains gibberish or blank sheets of paper or that a party may serve a Response to a Request for Further Information which provides some but not all of the information which a party has been ordered to provide. In such a case, it would be obvious that there has been non-compliance and the sanction takes effect. But this case is far removed from anything like that."*

And see [64]. ***Mason v Mills & Reeve LLP*** [2011] EWCA Civ 14; [2011] 1 W.L.R. 2735, CA, ***Quah Su-Ling v Goldman Sachs International*** [2015] EWHC 759 (Comm), unrep., CA, ***Nesbit Law Group LLP v Acasta European Insurance Co Ltd*** [2018] EWCA Civ 268, unrep., CA, ***Elite Property Holdings Ltd v Barclays Bank Plc*** [2019] EWCA Civ 204, unrep., CA, ***Scott v Singh*** [2020] EWHC 1714 (Comm), unrep., Comm., ref'd to. (See ***Civil Procedure 2023*** Vol.1, para. 17.3.8.)

■ X v The Transcription Agency LLP [2023] EWHC 1092 (KB), 9 May 2023, unrep. (Farbey J)

Data protection – application of judicial exemption

Data Protection Act 2018, Sch.2, para.14. The claimant sought their personal data via a data subject access request from two defendants; the court transcription agency and a High Court Master. The focus of the DSAR was a request for hearing transcripts and personal data concerning the case management of costs proceedings and a complaint to the Judicial Complaints and Investigations Office concerning an allegation of judicial misconduct. In issue was the application of the exemption applicable to the requirements of the Data Protection Act 2018 and UK General Data Protection Regulation that arise under Sch.2, para.14 of the 2018 Act. That provision provides an exemption from several obligations that arise under the 2018 Act where personal data is processed by either an individual or court acting in a judicial capacity or where compliance with those obligations may prejudice judicial independence. **Held**, the claim was dismissed. The judicial exemption was to be interpreted broadly. It was not limited to the making of decisions. Nor was it limited to the production of judgments. It was intended to apply to all judicial functions. It was to be interpreted consistently with the principle of judicial independence. DSARs were not to be used as a means to hold judges to account. Accountability was effected through appealing from judicial acts and decisions. As the judge put it:

> *"[73] It is wrong to pick a low hanging fruit by suggesting that, in the interests of rooting out wrongdoing, the judicial exemption should be narrowly construed and restricted to matters relating to the production of judgments or the making of decisions. First, such a submission ignores the parameters of the scheme of the UK GDPR and the DPA 2018. That scheme has a specific and limited purpose, which is to enable a person to check whether a data controller's processing of his or her 'personal data' unlawfully infringes privacy rights and, if so, to take such steps as the DPA 2018 provides (Durant v Financial Services Authority [2003] EWCA Civ 1746, [2004] FSR 28, para 27, per Auld LJ, in the context of earlier legislation but applicable to the present statutory scheme). It is impermissible to deploy the machinery of the Act as a proxy for the wider purpose of obtaining documents*

with a view to litigation or further investigation (Durant, para 31). The scheme for access to personal data is not a vehicle for a party to proceedings to root out information about a judge.

[74] Secondly, the DPA 2018 is not a general mechanism for holding judges to account for what they have done. The rule of law means that the way for parties to challenge judicial acts is the exercise of rights of appeal. The claimant has indeed consistently exercised his appeal rights in relation to the second defendant's decisions over the life of the costs proceedings. If data protection rights were deployed to hold judges to account, a party to litigation could use the machinery of the UK GDPR and the DPA 2018 to avoid the limits of an appellate jurisdiction (such as a requirement for permission to appeal) or to seek to undermine a judge's authority when appeal rights did not bring about the result that a party wished. Such a scenario would be contrary to the public interest.

[75] The claimant specifically complains about delay in the provision of transcripts. Parliament has in the Constitutional Reform Act 2005 enacted a scheme for complaints about the conduct of judges. Under that scheme, complaints of judicial misconduct are handled by JCIO and JACO. The claimant has exercised the right to complain to JCIO and thereafter to JACO. It is in the public interest that the UK GDPR and the DPA 2018 should not be used as a proxy for the statutory complaints procedures.

[76] Thirdly, as Lord Esher M.R. held in Anderson v Gorrie, the public interest in the independence of the judiciary runs deep. This fundamental public interest is protected by the various elements of para 14(2) and (3) . . . the question of whether the claimant agrees with, or objects to, the way in which his data were processed is nothing to the point: if the data were processed by the second defendant acting in a judicial capacity, the public interest demands that they be exempt.

[77] The claimant maintains that the defendants' refusal to provide any personal data (save on a voluntary basis) amounts to a status-based blanket exemption for judges and those who process data at the request of judges. It is not in dispute that judges cannot claim a total exemption from providing personal data in response to SARs. The judicial exemption is limited to the matters set out in para 14. The claimant mischaracterises the defendants' submissions and aims his fire at the wrong target.

. . .

[83] By enacting the judicial exemption, Parliament restricted data subjects' GDPR rights in order to safeguard judicial independence. Parliament was entitled to restrict those rights under article 23(1)(f). The principal restriction is that judges are exempted from data protection obligations by virtue of para 14(2) which applies generally to all personal data processed by an individual 'acting in a judicial capacity.' In my judgment, Parliament has used this broad language in order to ensure that the exemption is not limited to data processed when a judge is producing (orally or in writing) a judgment or decision. Parliament intended that all judicial functions should be covered."

While not binding, the reasoning of the CJEU's decision on the scope of the application of the EU GDPR on judicial activity, supported this conclusion: ***X v Autoriteit Persoonsgegevens*** (2022). ***Anderson v Gorrie*** [1895] 1 Q.B. 668, CA, ***X v Autoriteit Persoonsgegevens*** [2022] 3 C.M.L.R. 26, 1069, CJEU, ref'd to. (See ***Civil Procedure 2023*** Vol.2, para. 3G.)

Practice Updates

STATUTORY INSTRUMENTS

CIVIL PROCEDURE (AMENDMENT) RULES 2023 (SI 2023/105). In force on **1 October 2023**. The statutory instrument is primarily focused on amendments to the CPR to give effect to the introduction of the new intermediate procedural case track. As a consequence it includes a new CPR Pt 26 and 28, both of which make provision for allocation to, and case management on, the new intermediate track. They also make provision for the interrelationship between the fast track and the new intermediate track, while also making provision for four new claim complexity bands across the two tracks. Allocation to one of the bands links to new provision for fixed recoverable costs in a new CPR Pt 45. Consequential amendments are also made to CPR Pt 36 to take account of the new fixed recoverable cost regime. Additionally, consequential amendments are made to the following Pts: 2, 3, 16, 21, 27, 29, 39, 44, 46, 52, 54, 55, 63 and 65. Amendments also transfer rules concerning costs in Aarhus Convention claims from CPR Pt 45 to a new section IX in CPR Pt 46.

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION – 156th Update. This Practice Direction effects a wide-range of amendments, which come into force on **1 October 2023**. At the time of writing the Ministry of Justice had, however, only published the index and signing page of the Update. The exact detail is not set out. The Ministry of Justice Civil Procedure Rules website notes that the PD Update will substitute a new PD 45, with revised fixed costs. It also notes that a revised PD 26 will be included, which will make provision for allocation to the new intermediate procedural case track, as well as provision for allocation within the fast and intermediate track to complexity bands that will link to the amount of fixed costs available under the new PD 45. It will also make provision for a significantly revised PD 28, which will take account of case management directions for the new intermediate track as well as make revised provision for case management on the fast track. That PD will also make provision for the allocation of noise-induced hearing loss claims to the fast track. The PD Update is also accompanied by a revised guidance note on fixed recoverable costs (see **In Detail,** below).

PRACTICE GUIDANCE

Pre-Action Protocol Update. On 9 May 2023, Sir Geoffrey Vos MR approved a series of amendments to the following Pre-Action Protocols: the Pre-Action Protocol for Personal Injury Claims; the Pre-Action Protocol for Disease and Illness Claims; the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents; the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims; and, the Pre-Action Protocol for Resolution of Package Travel Claims. The amendments come into force on **1 October 2023**. The amendments generally arise from amendments to CPR Pts 26, 36 and 45. Amendments to the Pre-Action Protocol for Disease and Illness Claims also focus on noise-induced hearing loss claims, which are said to generally fall within the terms of the Protocol, see new para.2.2A, as they are more likely to fall within the fast track.

The King's Bench Division Guide. On 18 May 2023, the 9th edition of the King's Bench Division Guide, now referred to as the King's Bench Guide, was issued. Updates include, new guidance on the completion of directions questionnaires, on expert witness joint statements, remote hearings, and embargoed judgments. Changes have been made to Hearing Directions and a new notice of allocation is included.

MISCELLANEOUS UPDATES

Court Funds Office – Interest Rates on Special and Basic Accounts. On 13 June 2023, the Lord Chancellor increased the interest rates payable on funds held in the special and basic accounts. The interest rate payable on funds held in the basic account increased from 3.188% to 3.375%. The interest rate payable on funds held in the special account increased from 4.25% to 4.50%. The rates were increased to both cover the Court Funds Office's running costs and to ensure that an increased rate of interest was payable.

In Detail

FIXED RECOVERABLE COSTS

The CPR and PD Updates issued in May 2023 and which come into force in October 2023 are intended to give effect, after some considerable time, to the introduction of an intermediate procedural case track and the extension of fixed recoverable costs: innovations that were both canvassed to varying degrees by the Woolf Inquiry in the 1990s and more recently promoted by and following the Jackson Civil Costs Review. In support of their introduction the Ministry of Justice has issued a recently updated information note on the new rules, which is available at: *https://www.justice.gov.uk/__data/assets/pdf_file/0011/177644/frc-public-notice-updated.pdf.* For ease of reference it is reprinted below.

Extending Fixed Recoverable Costs: a note on the new rules

General overview

1. From 1 October 2023, fixed recoverable costs (FRC) will be extended across the fast track[1], and in a new intermediate track for simpler cases valued up to £100,000 damages. Following a consultation on Sir Rupert Jackson's 2017 report,[2] the MoJ set out the way forward in September 2021.[3] The new rules to implement this extension have now been approved and laid before Parliament: The Civil Procedure (Amendment No. 2) Rules 2023 (legislation.gov.

uk). This note highlights the main features of the new arrangements, including further policy developments since September 2021. For example, and as set out in more detail below, there have been developments on QOCS (as already published), vulnerability, and it has been decided to delay the application of FRC for housing claims for two years.

2. There have been substantial changes to Part 45 (Fixed Costs), which has been largely re-written. A new Practice Direction (PD) 45 sets out the relevant tables of costs. Changes have been made to Part 26 (Case Management – Preliminary Stage) and PD 26, as well as Part 28 (The Fast Track) and PD 28; changes have also been made to Part 36 (Offers to Settle). Consequential changes have also been made to other Parts.

3. In the **fast track**, there will be four complexity bands (1 to 4 in ascending order of complexity) with associated grids of costs for the stages of a claim (see Table 12 in PD 45).

The new intermediate track

4. There will be a separate **intermediate track**, as recommended by Sir Rupert. The MoJ 2021 consultation response had envisaged intermediate cases being part of an expanded fast track. Instead, however, the fast track will remain as it is, and less complex multi-track cases under £100,000 damages will be allocated to a separate intermediate track.

5. In the intermediate track, there will be four complexity bands (1 to 4 in ascending order of complexity) with associated grids of costs for the stages of a claim (see Table 14 in PD 45). The stages of intermediate track claims have been revised from those proposed by Sir Rupert, to provide greater clarity and better reflect the stages of cases, particularly because the costs for each stage include costs for earlier stages. As with the fast track, the figures of FRC costs for the intermediate track in the 2017 Jackson report (which were fixed at July 2016) have been uprated for inflation using the January 2023 SPPI.

6. The normal bands for different types of case are set out in the rules (at **rule 26.15** and **rule 26.16**). There will be new standard directions for the intermediate track.

7. Much thought has been given over the years since Sir Rupert's review started as to the degree of specificity given as to which cases fall within which complexity band, without fettering the discretion in individual cases. The additional explanation of the normal bands for different cases is intended to provide helpful clarity without being overly prescriptive.

8. In drafting the new rules, a generic approach has been taken so far as possible such that all categories of case are covered by the same rules. An exception to this is noise induced hearing loss (NIHL) claims, which were addressed separately by Sir Rupert in his 2017 FRC report.[4] As set out in the Government's 2021 FRC consultation response, at Chapter 5, paragraph 4.4, the Government does not wish to provide further guidance regarding specific categories of case where possible, as this would risk being unnecessarily restrictive and prevent the extended FRC regime from operating as intended.

9. It is worth emphasising that judges will retain the discretion to allocate more complex cases valued at under £100,000 to the multi-track, so that complex cases will not be inappropriately captured by the extended FRC regime in any event. As set out by Sir Rupert, the new intermediate track will capture cases which can be tried in three days or less, with no more than two expert witnesses giving oral evidence on each side: more complex cases will be allocated to the multi-track.

Transitionals: which cases are subject to FRC from October 2023

10. The new FRC will apply to claims where proceedings are issued on or after 1 October 2023, save for personal injury. The new FRC will apply to personal injury claims where the cause of action accrues on or after 1 October 2023; and will only apply to disease claims where the letter of claim has not been sent to the defendant before 1 October 2023. The FRC tables have been uprated for inflation since they were set out by Sir Rupert in 2017. These FRC tables will be adjusted for inflation in future, as set out below. It should be noted that a claim will be subject to the table of costs that is in place on the date when a claim is issued for the duration of that case.

11. Exceptions to FRC are set out below.

Future review and inflation

12. The figures of FRC costs in the 2017 Jackson report (which were fixed at July 2016 and on which MoJ consulted in 2019), have been uprated for inflation using the January 2023 Services Producer Price Index (SPPI). As part of this process, the figures have been rounded so that the extended FRC regime starts off with a clearer set of figures.

13. The MoJ propose to review the tables of costs and the extended FRC regime more generally in 3 years' time, as proposed by Sir Rupert. More details about the nature and scope of the review will be set out nearer the time, but it

is proposed to include uprating for inflation in line with the SPPI. Decisions on the rounding of figures in future will need to be taken at the time.

MoJ consultations

14. In May 2022, MoJ consulted on the following two issues:

Qualified One-way Costs Shifting (QOCS)

15. Changes have been made to the QOCS regime in personal injury cases in Part 44 of the CPR. This issue arises from the Supreme Court case of *Ho* in 2021 and involves the scope of set-off. Having carefully considered the points raised by respondents to the consultation, the Government has implemented the rule changes on QOCS as set out in the consultation with a further amendment regarding 'agreements to pay or settle a claim for' at CPR rule 44.14(1). The Government considers that this will help to achieve the objectives of the consultation paper and ensure that the scope of set-off is appropriately addressed.

16. The QOCS changes were made as part of the Statutory Instrument, Civil Procedure (Amendment) Rules 2023, and have taken effect from April 2023. The MoJ's response to the consultation is published here: About us - Civil Procedure Rule Committee - GOV.UK (www.gov.uk).

Vulnerability

17. MoJ consulted on vulnerability provisions that would be implemented as part of the wider extension of FRC in Part 45 of the CPR. Having carefully considered the points raised by respondents, the Government has implemented the rule changes on vulnerability as set out in the consultation without further amend. These rule changes are included at rule 45.10 of the revised Part 45. To ensure consistency, the Government considers that the new vulnerability provision should, going forward, be applied to claims which, but for our reforms, would have been subject to the existing FRC regimes for personal injury cases in the current Part 45. The Government does not propose to make any changes to the arrangements for disbursements for vulnerability in FRC cases.

18. The vulnerability changes will take effect from 1 October 2023. The MoJ's response to the consultation is published here: About us - Civil Procedure Rule Committee - GOV.UK (www.gov.uk).

Exceptions from FRC

19. FRC will apply to all cases in the fast track and the new intermediate track, with the following exceptions. Most of these exceptions were identified in Sir Rupert's report and the MoJ consultation and response, but the decision to delay the implementation of housing claims was announced by MoJ in February 2023.

20. **Housing claims**: The implementation of FRC for all relevant housing claims will be delayed for two years from October 2023 pending further work, given various recent developments in the housing sector including proposed legislation. The specific wording of the housing exclusion is at **rule 45.1**. These cases will be allocated to the appropriate track (generally the fast track), as now, but will not be subject to FRC for the duration of the delay.

21. Sir Rupert recommended that mesothelioma and other asbestos related lung disease claims should be excluded from FRC and allocated to the multi-track. He also identified a number of claims that would be 'generally unsuitable' for the intermediate track because of their complexity. As set out in **rule 26.9(10)** of the new rules, the following case types will be **allocated to the multi-track** rather than the new intermediate track, and will thereby be excluded from FRC:

- A mesothelioma claim or asbestos lung disease claim;
- One which includes a claim for clinical negligence, unless (i) the claim is one which would normally be allocated to the intermediate track; and (ii) both breach of duty and causation have been admitted;
- A claim for damages in relation to harm, abuse or neglect of or by children or vulnerable adults;
- A claim that the court could order to be tried by jury if satisfied there is in issue a matter set out in section 66(3) of the County Courts Act 1984 or section 69(1) of the Senior Courts Act 1981;
- Claims against the police involving an intentional or reckless tort, or relief or remedy in relation to the Human Rights Act 1998. This exclusion does not apply to a road accident claim arising from negligent police driving, an employer's liability claim, or any claim for an accidental fall on police premises.

FRC in low value Clinical Negligence claims

22. As detailed in the paragraph above, in respect of rule 26.9(10), the Government's proposals on introducing FRC for clinical negligence cases up to £25,000 are being taken forward separately by the Department of Health and Social

Care (DHSC) and are not being introduced as part of this package of reforms. Following a Civil Justice Council report in October 2019, DHSC consulted on a new scheme in 2022. DHSC will set out the way forward in due course.

Application of FRC in different types of claim

23. **FRC in claims for or including non-monetary relief (NMR):** Most FRC claims will be for damages, and the tables of FRC recognise this by incorporating a percentage of damages recovered. Sir Rupert recognised that not all claims are for damages; his 2017 report noted the need for the court to assign a value to non-monetary relief in claims for, or including, non-monetary relief.[5] It has now been agreed that there will be fixed assigned values for individual bands, and that, in mixed claims (involving both monetary and non-monetary relief), FRC will be calculated in part by reference to the damages awarded, and also the assigned value for non-monetary relief, taken together.

24. Accordingly, the non-monetary relief values will be fixed for the fast track as follows: Band 1 = N/A (as non-monetary relief will not arise in these cases); Band 2 = £10,000; Band 3 = £15,000; Band 4 = £20,000; and for the intermediate track as follows: Band 1 = £25,000; Band 2 = £50,000; Band 3 = £75,000; Band 4 = £100,000. This is covered at rule 45.45(1)(a)(ii) and rule 45.50(2)(b)(ii) of the revised draft of Part 45. In claims including monetary *and* non-monetary relief, the amount of FRC will be calculated by reference to both the damages awarded and the assigned value for non-monetary relief. While Sir Rupert's intention was that the intermediate track should generally only be for monetary claims, he recognised that 'in exceptional circumstances a claim for non-monetary relief may be assigned to the new FRC regime' in the intermediate track in order to (i) limit adverse costs risks or (ii) to save the parties from 'ruinous litigation' (see his 2017 report at 7.1.5 and 7.3.8).

25. **FRC where there is more than one claimant represented by the same lawyer**: Under **rule 45.5**, each claimant will be entitled to the costs of their own claim except: (i) where the claim is for a remedy to which the claimants are jointly entitled, and they are joined to the proceedings to comply with **rule 19.3**; or (ii) where the court orders that additional claimants are each entitled only to 25% of the principal claimant's FRC. In respect of the second exception, the court may make such an order if it considers that it is in the interests of justice to do so, having regard to whether the claim of each claimant arises from the same or substantially the same facts and gives rise to the same or substantially the same issues. The court shall consider making such an order at allocation or assignment (see **rule 26.7(9)**).

26. **FRC for counterclaims**: Two sets of FRC may be calculated when a party is successful in both defending a claim and in bringing a counterclaim. Rule 45.7 provides that if in any case to which Section VI or Section VII applies, (a) the defendant brings a counterclaim and (b) the court makes an order for the costs, the rules shall apply as if the counterclaim were a claim. However, there are exceptions: first, the costs of the counterclaim will not be allowable where the only remedy sought by the counterclaim is a defence to the claim; and secondly, where in a claim to which the Pre-Action Protocol for Personal Injury Claims in Road Traffic Accidents applies there is a counterclaim which does not include a claim for personal injuries, any order for costs shall be for a sum equivalent to one half of the applicable Type A and Type B costs in Table 10.

27. **FRC where there is a preliminary issue trial**: Sir Rupert noted that the costs of any preliminary issue trial should be recovered separately (see his 2017 report at 5.5.14). He went on to discourage the use of preliminary issue trials in the fast track. The entitlement to costs in cases involving a preliminary issue trial is addressed in **rule 45.48** for the fast track and **rule 45.51** for the intermediate track. There are various scenarios in which a claimant or defendant wins at a preliminary issue trial and overall. The various costs entitlements are illustrated in the table at Annex A. It should be noted that while it may be unlikely for a claim to continue if the defendant has succeeded on a preliminary issue, these scenarios are included for completeness.

28. **Part 36 offers:** the arrangements for Part 36 offers to settle in low value personal injury cases already subject to FRC have been updated to cover all FRC claims.

29. **Noise Induced Hearing Loss (NIHL):** The rules which will implement the provisions for NIHL claims set out in the MoJ consultation response on FRC are included in section VIII of Part 45. The Pre-Action Protocol for Disease and Illness Claims and the Pre-action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims (PAPs) will be amended accordingly. There will also be new standard directions.

Other provisions

30. **HMCTS court forms** will be amended as appropriate for implementation in October 2023.

31. **HMRC Commencement Fees**: The Tables of HMRC fixed commencement costs and fixed costs on entry of judgment, which were previously Tables 7 and 8 of Part 45 are now to be found at Tables 8 and 9 in Part 45. Table 7 has been simplified.

32. **Aarhus Convention Claims**: What was Section VII of Part 45 (which is concerned with costs limits in Aarhus Convention claims) has been moved from Part 45 to Section IX in Part 46 (Costs special cases). While subject to minor amendments, the effect of these provisions remains the same.

33. For completeness, it should be noted that scale **costs in the Intellectual Property and Enterprise Court**, which formed Section IV of Part 45, now forms Section VII of Part 46 (Costs special cases). The provisions remain the same.

Ministry of Justice

May 2023

[1] The fast track is the normal track for claims up to a value of £25,000 where the trial is likely to last for no longer than one day and oral expert evidence is limited to one expert per party in any expert field, and expert evidence is limited to two expert fields.

[2] Sir Rupert Jackson's 2017 report on FRC: fixed-recoverable-costs-supplemental-report-online-2-1.pdf (judiciary.uk). MoJ consulted on this report in 2019: Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's proposals (justice.gov.uk).

[3] MoJ's 2021 consultation response on extending FRC: Extending Fixed Recoverable Costs in Civil Cases: The Government Response (justice.gov.uk).

[4] See Jackson, 2017, Chapter 5, 4.2, for Jackson's endorsement of a separate FRC scheme for NIHL claims.

[5] See Jackson 2017, 5.5.4, Table 5.2.

ANNEX A

COSTS ENTITLEMENT FOLLOWING PRELIMINARY ISSUE TRIALS

OUTCOMES	COSTS ORDER ON PRELIMINARY ISSUE	FINAL COSTS ORDER WHERE CLAIM CONTINUES	HOW COSTS ENTITLEMENT IS CALCULATED
Claimant successful on preliminary issue, claim continues and claimant successful overall	Claimant awarded costs	Claimant awarded costs	Claimant has an entitlement under both r.45.48(1) and r.45.48(2)(a)
Claimant successful on preliminary issue, claim continues and claimant successful overall	Costs reserved	Claimant awarded costs	Under CPR PD44 para 4.2 costs reserved become costs in the case and therefore costs reserved become the claimant's. As such the claimant has a costs order for both preliminary issue and final determination. Accordingly, claimant has an entitlement under both r.45.48(1) and r.45.48(2)(a)
Claimant successful on preliminary issue, claim continues and defendant successful overall	Claimant awarded costs	Defendant awarded costs	Claimant has an entitlement under r.45.48(1) and defendant has an entitlement under r.45.48(2)(b)

Claimant successful on preliminary issue, claim continues and defendant successful overall	Costs reserved	Defendant awarded costs	Under CPR PD44 para 4.2 costs reserved become costs in the case and therefore costs reserved become the defendant's. As such the defendant has a costs order for both preliminary issue and final determination. Accordingly, defendant has an entitlement under both r.45.48(1) and r.45.48(2)(a)
Defendant successful on preliminary issue. Claim concluded	Defendant awarded costs	N/A as order on preliminary issue is the final costs order	Defendant has an entitlement under r.45.48(1)
Defendant successful on preliminary issue, claim continues and defendant successful overall	Defendant awarded costs	Defendant awarded costs	Defendant has an entitlement under both r.45.48(1) and r.45.48(2)(a)
Defendant successful on preliminary issue, claim continues and defendant successful overall	Costs reserved	Defendant awarded costs	Under CPR PD44 para 4.2 costs reserved become costs in the case and therefore costs reserved become the defendant's. As such the defendant has a costs order for both preliminary issue and final determination. Accordingly, defendant has an entitlement under both r.45.48(1) and r.45.48(2)(a)
Defendant successful on preliminary issue, claim continues and claimant successful overall	Defendant awarded costs	Claimant awarded costs	Defendant has an entitlement under r.45.48(1) and claimant has an entitlement under r.45.48(2)(b)
Defendant successful on preliminary issue, claim continues and claimant successful overall	Costs reserved	Claimant awarded costs	Under CPR PD44 para 4.2 costs reserved become costs in the case and therefore costs reserved become the claimant's. As such the claimant has a costs order for both preliminary issue and final determination. Accordingly, claimant has an entitlement under both r.45.48(1) and r.45.48(2)(a)

This table has been prepared under the FT provision at r.45.48. However, the outcomes will be the same in the IT under the mirror provision at r.45.51.

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Published by Sweet & Maxwell Ltd, 5 Canada Square, Canary Wharf, London, E14 5AQ
ISSN 0958-9821

Typeset by Thomson Reuters
Printed by Hobbs The Printers Ltd, Totton, Hampshire.